No. 8686

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ARCHIE POULAS,

Appellant,

—VS.—

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

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Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

There was never before the trial Court any other question than whether the car of the appellant could be searched without a search warrant. The officers set forth as a part of the proceedings that the appel-

lant was the occupant of the car; that he was in possession of it and that they had been looking for a certain individual, the appellant, and for the particular car, a 1934 brown Oldsmobile Sedan, License number A-25-809 since the 9th day of February until the date of the search and seizure and arrest on the 17th day of February, 1937. Knowing the individual they were looking for and expecting to find liquor in the car, not only had they had this information from the 8th day of February to the 17th of February, but they had also seen the car and had made no attempt to get a search warrant and there was nothing as they came alongside of the car which was standing still, that would indicate that there was any whisky in the car. (T. p. 43).

In the case of *Alvau v. United States*, (C.C.A. 9), 33F, (2d) 222 the court held that one who was a guest or an employee at the time of the unlawful search and seizure was entitled to claim benefit of motion to suppress although he didn't join in petition for suppression, did not own the building and claimed no interest in the still, where at conclusion of the testi-

mony he joined in the motion to withdraw evidence secured through such search.

This case indicates that claiming ownership is not a condition precedent to asserting violation of your constitutional rights by an unlawful, unwarranted search and seizure.

In the case of *Kelly v. United States*, (C.C.A. 8) 61 F. (2d) 843, 846. 86 A.L.R. 238, the Court stated:

> "The question seems well settled . . . that one who is not the owner, lessee, or *lawful occupant* of the premises searched cannot raise the question under the Fourth Amendment of unlawful search and seizure."

This case seems to squarely denounce and refute appellee's contention that you must be an "*owner*" before you can invoke protection of the Fourth Amendment from unlawful search and seizure because the cases cited conclusively show that if you are a *guest* and *employee* or in control of the searched premises you may invoke protection under the Fourth Amendment.

In the present case, it was admitted in the record, appellant drove the car and at the time of the unlaw-

ful search and seizure was a lawful occupant of the car. Appellee's statement and authority is confined alone to a case where the defendant has disclaimed any connection or interest in the searched premises.

In *Byars v. United States*, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520, Mr. Justice Sutherland observed:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and in the Colonies, and the assurance against any revival of it, so carefully embodied in the fundamental law is not to be impaired by judicial sanction or equivocal methods which regarded superficially may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

The three cases that counsel for appellee has cited are instances where the defendant disclaimed any relation whatever with the place and none of them pretend to support a situation such as the case at Bar where the appellant was the occupant of the car and in possession thereof and had driven the same to the curb where it was parked and appellant was sitting in the car at the time of the search and seizure.

Appellee cites *Kwong How v. United States*, 71 F.

(2d) 71, as authority for his position that only the owner of, or one claiming an interest in the article seized can object to the seizure as unlawful and unreasonable. But in *Kwong How v. U. S., supra*, in his testimony, appellant disclaimed all dominion over the place and the property where the search and seizure took place.

The only question before the Court was the question whether or not an automobile could be searched and liquor seized under the facts of the present case. Counsel for the appellee at the time of his argument cited and now cites in his Brief the case of *Carroll v. United States*, 267 U. S. 132, and relies strongly and almost entirely upon the Carroll case and it is appellant's purpose to show that the Carroll case has no application to the facts of the case at bar and is not in point.

The case of *United States v. Allen* (S. D. Fla. 1926) 16 F. (2d) 320 is squarely in point and distinguishes the Carroll case.

The Court said:

> "The government, in urging the admission in evidence of the liquors in question, relied entirely

> upon the holding of the United States Supreme Court in the case of *Carroll, et al, v. United States*, 267 U. S. 132. The rule of law controlling the question of search and seizure of automobiles on the public highway, without the aid of search warrant is clearly and distinctly laid down in the Carroll case. The rule is to the effect that such searches and seizures are legal when the facts and circumstances within the knowledge of the seizing officers, and of which they have reasonable trustworthy information, are such in themselves to 'warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile . . . ', which is the subject of such seizure."

The facts in the Carroll case, which led the Supreme Court of the United States to the conclusion that this rule had been met, and that the search and seizure in that case was justifiable, showed that the prohibition officers, who made the seizure, some time prior to that time had a conference with the defendants, Carroll and Kiro and arranged to purchase from them three cases of whiskey. The defendants advised that they would go and get the liquor, they went and returned, or one of them did, and said that he could not get the liquor that night. The defendants came to this conference in an Oldsmobile roadster, which was seen

by the prohibition officers, and the number of the license tag was taken by them.

About two months later these same prohibition agents passed this same car, bearing the same license number, on a public highway going westward, presumably from Detroit. The same men who agreed to sell the liquor at the previous meeting in Grand Rapids were in the automobile, and the court held that these officers, seeing and knowing the occupants of the car, knowing the car by the license tag, which it bore to be the same car, which said occupants used at the time of the agreement to furnish liquor in violation of the law, were justified in believing the car was being used to unlawfully transport intoxicating liquor, and were justified in searching and seizing same without a search warrant.

Then the Court went on to say:

> "Do the facts in the instant case measure up to the rule laid down in the Carroll case? I do not think so. They *show* that the seizing officers had no personal knowledge whatever of the alleged unlawful transportation of liquor in the car seized; *that they acted* upon information (the source of which, or the reliability of which, was not disclosed); that a Studebaker sedan car, with blue

headlights and a driving light in the center, would be, or might be used on this road at the time in question for the unlawful transportation of liquor. It is admitted that other Studebaker cars—that many Studebaker cars are equipped in the same way as the car in question."

The Court went on further to say:

"That the facts upon which these prohibition agents based their right to search and seize this automobile without a search warrant would justify them in stopping and searching any and every Studebaker sedan automobile that might happen to have blue headlights, a driving light in the center, and with dust and dirt on the back of it."

Mr. Chief Justice Taft, while sustaining the seizure in the Carroll case said:

"It would be intolerable and unreasonable if prohibition agents were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary . . . But those lawfully within the country, are entitled to use the public highways and have a right to free passage without interruption or search, unless there is known to a competent official, authorized to search, probable cause for believing that these vehicles are carrying contraband or illegal merchandise."

The Carroll case is distinguishable because there the prohibition agents *knew* and it was within their own personal knowledge that defendants were transporting liquor. They ordered liquor from the defendants, had prearranged meetings, while in the appellant's case, the agents had no personal knowledge, and they acted on rumor and uncertain information, the source of which, or the reliability of which was not disclosed, and it is evident from these facts, that they did not have probable cause and that the Constitutional rights of the defendants were infringed upon.

Another case squarely in point and one which also distinguishes the Carroll case is *United States v. Blich*, (D. C. Wyo. 1930) 45 F. (2d) 627.

The facts of this case show that two prohibition officers received what one agent says in his affidavit, was reliable information, and what the agent who testified orally, designates as the advice of a reliable informant, that the defendant at a certain time would be making delivery of liquor at a certain designated place on the evening in question; that this information was received between four and five in the afternoon,

and that the designated time of the transportation was between seven and eight in the evening. The officers proceeded to the place, saw defendant's car and saw a stone jug of whisky protruding from a rip in gunnysack and detected odor of whisky, also officer said that defendant had been convicted of liquor violations before.

The Court said:

> "The Carroll case strongly intimates that the procedure of searching automobiles for liquor violations upon public highways is only permissible when a search warrant cannot be obtained on account of the moving nature of the vehicle, I believe that the probable cause in such a case ought to be such as might be established before a competent tribunal as the basis for a search warrant, otherwise the mental action of the officer amounts to no more than a suspicion, which is admittedly under the *Carroll case* and many other cases, not sufficient for search and seizure without a warrant. If the officers who in this case made the search and seizure had proceeded upon their information to secure a search warrant (which counsel for defendants, claim they had ample time) it would have clearly been obligatory upon them to produce the evidence of the party who purported to know of the transportation about to be carried out, otherwise to attempt to secure a warrant would have been upon mere information and belief, which the courts hold insufficient. I am

of the opinion that the only safe rule to adopt will be to require officers who presume to make a search and seizure of automobiles on the public highway without warrant, to disclose every element which goes to make up their case of probable cause, and this rule reasonably includes the source of their information, so that the Court may determine whether or not under all the circumstances a case of probable cause has been established, and perhaps as well to restrict the informers to a sincerity of purpose."

"A fair analysis of the Carroll case simply amounts to this, that upon probable cause, an automobile may be searched and seized upon a public highway by proper authorities, without a search warrant, but that every case must rest upon its own bottom and be controlled by its own facts and circumstances as to the sufficiency of the probable cause."

In the case of *Wisniewski v. United States*, (C.C.A. 6th Circuit) 47 Fed. (2d) 825, the facts show that the officers on August 23rd, 1930, had been "informed" that the defendant who was said to be dealing in intoxicating liquor was to make a delivery during that forenoon at his meat market at 900 Michigan Avenue in the City of Grand Rapids; that similar information was secured on four different occasions from the same informer, that it was always reliable;

that delivery was to be made in a Studebaker sedan bearing license No. 594-190 or in an Essex coach bearing license No. 594-191, and the court held that this alone was not sufficient in itself to constitute probable cause, and the reason that search and seizure was upheld in that case was due to the fact that they saw the defendant take from the car jugs of whisky in a burlap sack out of the car and put it into another car and then they stopped him.

The court said that the previous information would amount to no more than a mere suspicion, and the later developments were what made the search and seizure good.

In *Brown v. United States* (C.C.A. 9) 4 F. (2d) 246, Judge Rudkin said:

> "That prior to the time the officers had been informed that the plaintiff in error was a bootlegger, license number of the car had been furnished, but the source of information not disclosed in the case, that on other occasions, the plaintiff in error had delivered packages, and beyond the foregoing, the officer had no knowledge of any kind and no information of any source that a crime was being committed in his presence."

Judge Rudkin said:

> "While an officer may arrest without a warrant for reasonable cause, he can only count on evidence, not mere suspicion."

In *Husty v. United States*, 282 U. S. 694, cited by appellee in his brief, there the Court emphasized the fact that when an attempt was made to stop the defendants, two of them fled and attempted to escape arrest and that their acts were such as to cause their apprehension, arrest and subsequent search.

The car at that time was moving, so the Court justified the arrest due to the fact of the two defendants attempted escape, and that it was reasonable to believe that contraband would be found in the car.

We have no suspicious circustances in the case at Bar.

In *Kaiser v. United States*, (C. C. A. Minn. 1932) 60 F. (2d) 410 the facts are different entirely in that the operation was notorious in the neighborhood and that the neighbors knew about the plant and storage warehouse and the neighbors had been interviewed and the premises had been under observation for a period of two months and during that period the evi-

dence disclosed that cars approached the premises used for storage, went through certain specified peculiar actions before arriving at the place of storage; that just previous to the arrest, the officers made two long investigations and observation of the car checking it specifically and that they had been under observation for a period of two months and emphasizing the system adopted by the cars approaching the storage warehouse to signal their approach by snapping off some of their lights and leaving other of their lights on and when on the day in question a car was seen to leave the premises used as the office and performed the same peculiar actions and was then driven to the premises used as the storage warehouse, would lead a reasonably discreet and prudent man to believe that the operations were illegal and that they were in possession of contrabrand.

That there was no probable cause shown in the present case.

In *Turner v. United States,* (C. C. A. 10), 73 F. (2d) 838, cited by appellee in his brief, the facts there disclose that the agents having information that the

defendant was back in the whisky business and were informed that on the 25th day of September, 1933, that the defendant was going to another city for a load, the officers went to defendant's home and found on checking that he was absent from his home. Having secured this information and the information as to the kind of car defendant was driving and the license number, they watched for his return and upon his approaching they attempted to stop his car and he speeded away in an effort to escape the officers and they pursued him and the fact that the defendant failed to stop caused the officers to give pursuit in an attempt to apprehend him, was a fact which would constitute probable cause.

In the other cases cited by appellee, he seems to emphasize the fact that they are to the same effect and decisive of the present case.

In *Bess v. United States*, (C. C. A. 4) 49 F. (2d) 884, the facts disclose that they saw defendant unload the liquor and saw liquor in the car.

In the case of *Roach v. United States*, (C. C. A. 4) 51 F. (2d) 65, was a case where the defendant was fleeing. He was running away from the law.

In *Cassidy v. United States*, (C.C.A., D.C.) 49 F. (2d) 504, they had been watching the defendant for a considerable period of time and knew that he went from particular premises with certain packages and this particular day they saw him take a package to these premises and subsequently came back and started fixing up the upholstering in his car when they arrested him.

In the case *United States v. Notto*, (CCA 2) 61 F. (2d) 781, cited by appellee in his brief, the officers in this particular case smelled the odor of whisky and there was a load of barrels in the truck which were evidently so heavy that the truck sagged from their weight and the evidence of the smell of intoxicating liquor gave the officers probable cause for making the search.

In *Weatherbee v. United States*, (CCA 5), 62 F. (2d) 822, cited in appellee's brief the officers saw the defendant removing the package and subsequently put the package back in the car and then proceeded with the search.

If in the present case, it is unnecessary to have a search warrant, there can be no case where it is ne-

cessary to have one. When there are no circumstances of any sort, which would justify the officers in believing that there is evidence of probable cause and they can justify a search without a warrant by merely stating that the defendant told them that he had contraband in the car and with the further statement that they had information. without disclosing its source or reliability, then search warrants can be abolished so far as the apprehension of automobiles and their search is involved. There would be no necessity for an officer having to show under oath, probable cause, if he can avoid the legal necessity of so doing by the bare statement that somebody told him that they had whisky in their car.

None of the cases cited by appellee in its brief are in point. Each of them have some facts which clearly disclose evidence of probable cause to believe a crime was being committed. In the present case there was no evidence of any violation of the law and the trial Court only remarked that there was a difference between searching a home and a person's automobile.

This we will readily agree with, but it does not carry with it a justification for searching anyone's automobile without a search warrant. If a person's constitutional rights mean anything at all, then the appellant's petition in this case should be granted.

Respectfully submitted,

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